Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of)	
)	
Service Rules for Advanced Wireless Services in)	WT Docket No. 12-70
the 2000-2020 MHz and 2180-2200 MHz Bands)	
)	
Fixed and Mobile Services in the Mobile Satellite)	ET Docket No. 10-142
Service Bands at 1525-1559 MHz and 1626.5-)	
1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500)	
MHz, and 2000-2020 MHz and 2180-2200 MHz)	
)	
Service Rules for Advanced Wireless Services in)	WT Docket No. 04-356
the 1915-1920 MHz, 1995-2000 MHz, 2020-2025)	
MHz and 2175-2180 MHz Bands)	

COMMENTS OF RCA - THE COMPETITIVE CARRIERS ASSOCIATION

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RCA – The Competitive Carriers Association ("RCA") hereby submits comments in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry in the above-captioned proceedings ("NPRM"). RCA represents the interests of more than 100 competitive wireless carriers, including many rural and regional carriers. RCA's members are pleased that the Commission is pursuing policies that will make spectrum available for wireless broadband use, and are focused on ensuring that the Commission implements its policies in a manner that will promote competition.

INTRODUCTION AND SUMMARY

The *NPRM* proposes to establish service rules for the AWS-4 Band that would enable stand-alone terrestrial broadband service, and to grant separate licenses for such terrestrial service to the incumbent licensee, DISH Network Corporation ("DISH"). The assignment of licenses to DISH would authorize it to deploy a terrestrial mobile and fixed broadband network in the AWS-4 Band. The *NPRM* also seeks comment on the desirability of an alternative band plan that includes auctioning the upper portion of the H Block, and asks whether the use of the H Block spectrum would lead to harmful interference in the upper PCS band.²

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Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands; Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz; Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 12-70, ET Docket No. 10-142, WT Docket No. 04-356 (rel. March 21, 2012).

² NPRM ¶ 139.

This proceeding arises at a time when competition in the wireless industry is in its most precarious state in over a decade. As RCA has explained on numerous occasions,³ the wireless industry has become dangerously concentrated. The two largest wireless providers now constitute a virtual duopoly, and they exercise market power over critical inputs (such as spectrum, roaming, and devices) as well as in the retail marketplace. The Commission's recent staff analysis issued in connection with AT&T's now-abandoned proposal to acquire T-Mobile observed that AT&T and Verizon each accounted for over 30 percent of total subscribers and industry revenue by the end of 2010, and together accounted for an astounding 80 percent of industry EBITDA. 4 Critically, AT&T and Verizon now control the lion's share of usable spectrum and have been wielding their spectrum holdings in a manner that impairs competition from smaller rivals. These super-carriers' dominant spectrum positions enable them to disadvantage rivals by demanding unreasonable terms for voice and data roaming and impeding the availability of interoperable devices to smaller carriers. For these and other reasons, the Commission in its two most recent Wireless Competition Reports has been unable to certify that the wireless industry is characterized by effective competition.⁵ And the problem is getting steadily worse.

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See, e.g., Comments of RCA – The Competitive Carriers Association, Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, WT Docket No. 11-186 (filed Dec. 5, 2011).

Application of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, Staff Analysis and Findings, WT Docket No. 11-65, ¶ 37 (rel. Nov. 29, 2011).

Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, 25 FCC Rcd. 11407, 11435 ¶16 (2010); Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, 26 FCC Rcd. 9664, 9691 ¶ 14 (2011).

Against this backdrop, RCA views the Commission's proposal to enable DISH to deploy a terrestrial-only 4G wireless network in the AWS-4 Band with cautious optimism. If properly structured and with proper conditions to ensure deployment of a nationwide network, the grant of authority to DISH to deploy a new terrestrial wireless broadband network could help to ease some of the structural imbalances in the wireless industry. The Commission would increase the supply of spectrum for mobile broadband uses and give competitive carriers access to a new nationwide mobile broadband network via roaming and wholesale agreements. In turn, competitive carriers' improved access to critical inputs for mobile broadband services could help take competition off life support. In the current spectrum-starved environment, RCA applauds the Commission's efforts to quickly increase the supply of spectrum for mobile broadband services and commends its efforts to remove unnecessary regulatory barriers to mobile broadband deployment. Given competitive carriers' urgent need for additional spectrum, it is critical for the Commission to resolve the rules for terrestrial use of the 2 GHz band as soon as practicable.

At the same time, if the AWS-4 spectrum is not deployed in a timely and procompetitive manner, then the changes in service rules for the 2 GHz MSS Band not only will present a lost opportunity, but may end up being counterproductive. If the Commission does not establish a workable framework for commercial deployment, if the spectrum is not built out quickly, if a portion is not recaptured to help alleviate the severe spectrum shortage, and if there are limited wholesale or roaming opportunities for competitive carriers, or—in the worst-case scenario—if the spectrum ends up in the hands of AT&T or Verizon, the likely result would be to solidify or exacerbate the current market imbalances. The prospect of expanding the permitted uses of AWS-4 spectrum and eliminating the ATC gating criteria also presents fairness concerns, as

DISH stands to benefit from a potential windfall. Competitive carriers are struggling to obtain access to sufficient spectrum in an environment marked by scarcity. The Commission must be mindful of the tremendous value it is bestowing on a single licensee and license the AWS-4 spectrum accordingly..

Despite the potential windfall, RCA supports the Commission's proposal to establish terrestrial service rules for AWS-4 spectrum that promotes mobile broadband services, and to use its license modification authority under Section 316 of the Communications Act to assign the AWS-4 licenses in the 2 GHz Band to DISH, subject to appropriate conditions. In particular, RCA believes that the Commission must take certain additional steps to ensure that the service rules for the AWS-4 Band truly increase competition for mobile broadband services and do not inadvertently strengthen the duopoly power enjoyed by the largest wireless carriers. The Commission also should implement service rules and license conditions that prevent DISH from reaping an unjustified windfall at the expense of competitive carriers that are forced to acquire additional spectrum at auction.

First, the Commission should take several steps to ensure that the AWS-4 spectrum is built out in a timely fashion and is deployed in a manner that will increase competition. Among other things, the Commission should require DISH to meet stringent buildout milestones, to make a minimum portion of its network available to competitive carriers at cost-based wholesale rates, and to provide roaming at cost-based rates to any competitive carrier whose network is technologically compatible. The Commission also should preclude DISH from entering into wholesale or roaming agreements with either of the two largest wireless carriers without prior Commission approval, to avoid the entrenchment of duopoly power that has plagued the wireless

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⁶ See 47 U.S.C. § 316.

industry in recent years. Furthermore, the Commission should take steps to ensure that the AWS-4 spectrum is available for use quickly and to its fullest capacity. RCA also agrees with LightSquared that the Commission should expand the scope of its Notice of Inquiry to include the MSS portions of the L Band to harmonize the regulatory treatment of those bands and to consider cross-band options that could maximize the use of spectrum.

Second, the Commission should take steps to prevent unjust enrichment. To ensure the rapid deployment of the spectrum, and to prevent DISH from seeking to flip the licenses to AT&T or Verizon, the Commission should adopt unjust enrichment provisions. Because the single worst outcome from a competitive perspective would be for AT&T or Verizon to end up controlling this spectrum, such penalties should apply to DISH if it were to transfer or assign its licenses to either of the two largest carriers within the next ten years.

Finally, consistent with the overwhelming public interest in getting additional spectrum into the marketplace, RCA also urges the Commission to move expeditiously to license the PCS H Block spectrum. The benefits of injecting additional licensed spectrum into the PCS bands far outweigh the modest operating constraints that new H Block licensees would have to observe to protect incumbent operators.

DISCUSSION

I. THE COMMISSION SHOULD IMPLEMENT SERVICE RULES THAT ENSURE DEPLOYMENT OF THE AWS-4 SPECTRUM IN A MANNER THAT PROMOTES COMPETITION

To ensure that the AWS-4 spectrum is deployed in a manner that promotes, rather than hinders, competition, the Commission should implement license conditions and service rules that will help level the playing field and improve the ability of competitive carriers to challenge the dominance of AT&T and Verizon.

A. The Commission Should Impose Stringent Buildout Requirements

To ensure that the AWS-4 licensee makes effective use of the immensely valuable terrestrial rights at issue, the Commission should implement buildout requirements that ensure the timely and commercially reasonable deployment of service. The *NPRM* proposes buildout milestones that establish reasonable benchmarks for providing signal coverage and offering service. While RCA supports accelerated buildout requirements, the penalties that the NPRM proposes for failure to meet the prescribed milestones are too draconian. For example, the NPRM proposes that if the licensee fails to meet the interim buildout requirements, the licensee would lose all of its authorizations. The Commission instead should withdraw the licensee's authority only with respect to the particular Economic Areas (EAs) in which the licensee fails to meet the buildout requirement after taking into account market realities, including access to equipment. A licensee likely would meet the interim benchmark in some EAs but not others; in that instance, other carriers should be given an opportunity to provide service in the EAs where the licensee missed the benchmarks. But taking away all of the licensee's authorizations would unnecessarily harm consumers in the EAs where the licensee is providing service. The Commission can appropriately incentivize the timely deployment of the AWS-4 Band while continuing to promote the public interest through the EA-based approach.

B. The Commission Should Require DISH To Offer Wholesale and Roaming Agreements That Advance the Public Interest

One of the principal benefits of the Commission's proposal to enable terrestrial use of the AWS-4 spectrum is that it potentially opens a significant swath of spectrum for use by competitive carriers on a wholesale basis or via roaming arrangements. To ensure that the

⁷ *NPRM* ¶ 92.

⁸ *Id.* ¶ 94.

benefits of the Commission's proposals inure to the industry and to consumers, the Commission should require AWS-4 licensees to offer wholesale and roaming to competitive carriers.

Specifically, the Commission should require AWS-4 licensees to make available a minimum percentage of their spectrum capacity to competitive carriers at wholesale rates. It also should require AWS-4 licensees to offer data roaming on commercially reasonable rates, terms, and conditions with any competitive carrier whose network is technologically compatible. And if an AWS-4 licensee provides wholesale access to its network, the wholesale customer likewise should be required to offer roaming on commercially reasonable rates, terms, and conditions.

Roaming obligations, in other words, should facilitate the widespread use of the spectrum, irrespective of the particular carrier that is operating in the band.

Critically, however, the benefits of making spectrum available on a wholesale or roaming basis would be undermined if the spectrum were controlled by AT&T or Verizon. The current market imbalance is driven in significant part by AT&T's and Verizon's combined control over scarce spectrum resources, and the AWS-4 spectrum should be used to alleviate rather than exacerbate the industry's spectrum imbalance. The Commission therefore should impose a requirement that AWS-4 licensees must not enter into any agreement, directly or indirectly, to provide their spectrum on a wholesale basis to any entity that, at the time the agreement is entered into, is the largest or second largest wireless provider, without receiving prior Commission approval. The Commission also should implement a condition that licensees not be permitted directly or indirectly to provide via their terrestrial networks, to any combination of the largest and second largest wireless providers, traffic accounting for more than 25 percent of the total bytes of data carried over that network without prior Commission approval. This condition

should apply at the level of each Economic Area, and for each rolling 12-month period (as determined at the end of each calendar quarter).

The Commission has recognized the need for such conditions even when marketplace circumstances were less dire than they are today. When Harbinger acquired Skyterra, virtually identical conditions were imposed that prohibited Harbinger from entering into any agreement or otherwise making the spectrum used by its terrestrial network available to the largest or second largest wireless provider without receiving prior Commission approval. These conditions reflected the reality that the largest and second largest wireless carriers (then, as now, Verizon and AT&T) were in dominant positions and that the public interest would be served by allowing competing carriers to have greater access to spectrum on a wholesale basis. The justifications for similar conditions are much stronger today, as AT&T and Verizon continue to expand their market power at the expense of competing carriers. The Commission here is taking an important step forward in making critical spectrum available to the wireless industry; it must ensure that the spectrum is used to promote competition, rather than entrench or even enhance market power that impedes the delivery of benefits to consumers today.

C. The Commission Should Take Additional Steps To Accelerate The Efficient Deployment of the AWS-4 Spectrum and L-Band Spectrum

The Commission's efforts "to increase the Nation's supply of spectrum for mobile broadband" will be successful only if the spectrum actually is deployed in a timely and efficient manner. The Commission should act in this proceeding to ensure the AWS-4 spectrum is made available for mobile broadband as quickly and efficiently as possible.

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See SkyTerra Communications, Inc. and Harbinger Capital Partners Funds, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd 3059, Attachment 2 (conditions) (IB, OET, WTB 2010).

NPRM ¶ 1.

The FCC recently found that mobile broadband traffic will increase 35-fold by 2015.

Given limited spectrum availability, such increased data usage on smaller and mid-sized carriers' networks will pose substantial challenges, and could thwart altogether efforts of new entrants.

The impeding industry transition to LTE and LTE Advanced and consumer demand for ever more data-intensive devices make spectrum more valuable than ever, but the reality is that the largest two carriers are limiting the deployment of next-generation services to American consumers by amassing all available scarce spectrum resources.

Today's market for LTE-ready spectrum is stagnant at best, with little or no opportunities for competitive providers to gain access to LTE-ready spectrum suitable for the provision of mobile broadband. The Commission should take immediate action to make more spectrum available for mobile broadband use—both in this proceeding and others—to help spur innovation and investment, particularly for competitive carriers.

Unfortunately, the Commission's objective to introduce new spectrum for mobile broadband use has been frustrated. Many spectrum bands that the Commission hoped to make available for mobile broadband will not likely be available for deployment in the near future. The Commission previously identified the 1755-1850 MHz spectrum band, currently being used by the Federal government, as ripe for reallocation. Based on a recent report by NTIA, this spectrum will not be immediately available for reallocation. LightSquared has now declared bankruptcy as it fights to save its terrestrial authority, foreclosing, at least temporarily, competitive carriers' opportunity to partner with a dedicated wholesale provider for access to additional 4G broadband spectrum. And while Congress has provided the Commission with authority to conduct incentive auctions of broadcast spectrum, this multi-year process has just

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Fed. Commc'ns Comm'n, Mobile Broadband: The Benefits of Additional Spectrum 9 (2010).

begun. The 2 GHz MSS band represents a clear opportunity to introduce new LTE-ready spectrum for mobile broadband usage. Given industry trends and recent and proposed consolidation, the Commission should make the 2 GHz spectrum available for commercial use as soon as practicable.

RCA also agrees with LightSquared that the Commission should expand the scope of its Notice of Inquiry to include the MSS portions of the L Band. As LightSquared recently argued, expanding the NOI to include the L Band would enable the Commission to consider "crossband" options and "rearrangements of frequency blocks ... [to] address GPS issues while at the same time maximizing use of the L Band MSS spectrum for terrestrial purposes." Given the current spectrum scarcity, and the inability of the Commission to expedite LightSquared's deployment of a broadband network using its L Band licenses, the Commission should be evaluating all possible means to promote more efficient and effective use of existing spectrum resources. Expanding the NOI to include the L Band would allow the Commission to achieve parity in the regulatory treatment of the L Band and AWS-4, which would promote certainty and efficient investment, and also would enable the Commission to consider cross-band options that would maximize potential synergies between the two spectrum bands and potentially resolve any interference concerns raised by LightSquared's intended operations. The goal should be to make as much spectrum available for mobile broadband use as possible, and considering the two bands together may best advance that goal.

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See Letter to FCC Commissioners from Jeffrey J. Carlisle, LightSquared, Advanced Wireless Services in the 2 GHz Band, WT Docket No. 12-70, ET Docket No. 10-142, WT Docket No. 04-356, at 3 (filed April 25, 2012)

II. THE COMMISSION SHOULD ENSURE FAIRNESS AND PARITY IN THE WIRELESS INDUSTRY BY PREVENTING DISH FROM RECEIVING A POTENTIAL WINDFALL

The *NPRM* proposes to grant terrestrial AWS-4 licenses to the incumbent licensee,

DISH. 13 The Commission should implement certain limitations to prevent a potential windfall from the Commission's regulatory decisions.

The Commission can most effectively prevent DISH from receiving a potential windfall and ensure that the AWS-4 spectrum is used to promote competition by imposing unjust enrichment penalties on the transfer or assignment of the spectrum to either of the largest two wireless carriers. At a minimum, the Commission must safeguard the public interest by preventing the spectrum from being flipped to AT&T or Verizon. The Commission can do so by implementing unjust enrichment penalties that apply if DISH transfers or assigns the spectrum to either of the two largest wireless carriers within a specified time period.

Entity program as a model to impose repayment obligations if DISH transfers the spectrum to either of the two largest wireless carriers, although RCA submits that the restrictions should remain in place longer given the recent deterioration of competition in the wireless sector. For example, the Commission's rules call for the full repayment of the value of a Designated Entity's bidding credit if its spectrum is transferred in the first two years of the license term; 75 percent if transferred in year three; 50 percent if transferred in year four; and 25 percent if transferred in year five (with transfers after year five not subject to penalties). Here, the Commission should

¹³ *NPRM* ¶ 71.

¹⁴ See 47 C.F.I

See 47 C.F.R. § 1.2111(d)(2); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, Order, WT Docket No. 05-211 (released Feb. 1, 2012).

impose a similar repayment schedule—but over a ten-year period—that would apply to the difference in price between the amount that DISH paid for the spectrum and the amount for which it sold the spectrum. Such rules would give DISH the appropriate incentives to deploy the AWS-4 spectrum and thereby promote competition, rather than simply seek to monetize the Commission's conferral of valuable new spectrum rights by promptly transferring or assigning the spectrum to carriers who would use that spectrum to harm rather than enhance competition.

III. THE COMMISSION SHOULD QUICKLY LICENSE THE H BLOCK

Finally, the Commission should take swift action to license the H Block, which is adjacent to the PCS Bands. The PCS Bands represent some of the most used spectrum available today, and rising consumer demand for mobile data will place additional pressures on existing spectrum resources. He H Block represents the last natural expansion for the PCS Band and no other spectrum is available for auction that would permit carriers to build on existing infrastructure investments in providing wireless services. PCS licensees could incorporate H Block frequencies into their existing operations, providing additional capacity for such operations and allowing mobile carriers to offer new or expanded services quickly and efficiently. Opening the H Block for PCS use will also encourage major carriers to engage in collaborative arrangements with regional and rural carriers that receive H Block spectrum through auction, creating opportunities for roaming, joint builds, and other efforts to expand mobile broadband deployment, especially in rural areas. Any concerns about harmful

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The Designated Entity unjust enrichment penalties apply for five years, but there is little chance that the sale of a single license by a small company would adversely affect the nationwide competitive landscape. Here, however, there is substantial risk that the sale of AWS-4 licenses would affect nationwide competition, and thus the restrictions should apply for a longer period so as to prevent not only unjust enrichment, but also harm to competition on the national level.

¹⁶ See NPRM ¶ 10.

interference can be reasonably managed through power limitations; indeed, the finely tuned power controls of the LTE air interface offer even greater possibilities to calibrate power levels in a manner that will protect incumbent licensees.

CONCLUSION

For the foregoing reasons, the Commission should continue to pursue its goals of removing unnecessary regulatory hurdles and accelerating the deployment of a terrestrial broadband network in the 2 GHz MSS Band. To maximize the procompetitive potential of this spectrum band, the Commission should implement the rules it proposes in the *NPRM*, subject to the conditions and refinements discussed above.

Respectfully submitted,

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